

Supreme Court

FILED

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IN THE

Supreme Court of the United States

Term, 19.....

No. **76-19**

THOMAS WARREN HENNING a/k/a
THOMAS WARREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANLEY W. GREENFIELD, ESQUIRE,
GREENFIELD & MINSKY,
Counsel for Petitioner,
412 Carlton House,
Pittsburgh, Pennsylvania 15219,
(412) 281-8801.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, SENIOR REPRESENTATIVE
HAROLD L. BERGNER, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-661-7425

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE THIRD CIRCUIT**

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on March 23, 1976, which affirmed the District Court's judgment.

Opinions Below

The District Court for the Western District of Pennsylvania sentenced Petitioner immediately after the verdict. No motion for new trial was thus filed and a direct appeal was taken to the Third Circuit Court of Appeals, which affirmed by Order (Appendix pp. 7, 8, 9). A Petition for Rehearing was also denied by simple order (Appendix pp. 10, 11).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Was Petitioner denied due process in being convicted of mail fraud where the testimony did not support the inference that the mails were used, but directly indicated that the alleged mailings were in fact hand delivered.

Statement

Petitioner and one Leonard Sweeney, a Pittsburgh Attorney and State Legislator, were charged together with eight other defendants in a nine count indictment with violations of Sections 371 and 1341 of 18 U.S.C. Count one of the indictment charged all ten defendants of conspiracy to defraud certain automobile insurance companies through use of the mails in connection with presentation of two claims for allegedly staged accidents. Counts two through nine alleged specific counts of use of the mails in furtherance of the alleged scheme. Following a jury trial, Petitioner was convicted of counts one, two, and three, and acquitted of counts four and seven; Petitioner was not named in the remaining counts. Count two charged Petitioner and Attorney Sweeney, among others, with causing Sweeney's letter of legal representation to be delivered by the United States Postal Service to the Ohio Casualty Company. Count three charged Petitioner and Sweeney, among others, with causing a letter containing a release to be delivered by the United States Postal Service to the Ohio Casualty Insurance Company.

Testimony during trial indicated that Sweeney had clerked for the firm of Herbert Lurie, the chief prosecution witness,

while attending law school and had been associated with the firm in the practice of law for a time after graduation (93a-95a). After Sweeney left the firm, he maintained a relationship with Lurie who settled Petitioner's case for Sweeney. (104a-110a) Moreover, Lurie "had a very good relationship with Ohio Casualty Insurance Company" (202a). Lurie testified that he had known Ernest Leavy, Senior Adjuster of Ohio Casualty, for about twenty years, and that for ten years had been giving Leavy money without expectation of repayment. (105a-107a) Leavy, also testifying under grant of immunity, corroborated this testimony (300a-303a; 390a-391a).

Although Leavy identified Exhibit 13-K (the letter designated Sweeney as legal representative for Petitioner) (351a), in connection with count two, the government presented no affirmative evidence that a mailing took place regarding this letter. Adjuster Leavy and Attorneys Sweeney and Lurie all understood that Lurie would negotiate Petitioner's settlement for Sweeney (353a; 354a; 360a; 361a). At the time Lurie was acting as negotiating counsel in the Henning settlement, Lurie and Leavy (Ohio Casualty) maintained offices in the same building, the Law and Finance Building, in downtown Pittsburgh (34a). On cross examination, Leavy admitted that he had no specific recall of receiving the letters from Sweeney (Exhibits 13-K, 13-L, 13-B, 20-G) by mail (430a). Miss Putz, sole legal secretary for Sweeney at the time the letters were written, testified as a government witness that she had no specific recollection of mailing the letters (629a-640a). Whether the letters in question were mailed in the normal course of business was never affirmatively shown by the government. The defense, on the other hand, presented testimony which indicated that the letter of representation in support of count 2, and the releases in support of count 3, were in fact hand delivered (108a; 186a; 203a; 340a), since it was Lurie as negotiating counsel, having a special relationship with Leavy, who was handling all paperwork relevant to that settlement.

After his conviction, Petitioner was sentenced to the custody of the Attorney General for four (4) years to become eligible for parole, under the provisions of 18 U.S.C. § 4208(a)(1), upon serving a term of one (1) year; and fined a total of Two Thousand (\$2,000.00) Dollars. The Motion for New Trial was denied and an appeal followed to the United States Court of Appeals for the Third Circuit. After oral argument, the Third Circuit Court of Appeals affirmed by Order, denied the Petition for Rehearing, from which this Petition followed.

Reasons for Granting the Writ

The government failed to prove beyond a reasonable doubt that the mails were used to deliver the letters which are the subject of counts two and three of Petitioner's mail fraud conviction. The government, through the testimony of Sweeney's legal secretary, Katherine Putz, attempted to show that the subject letters were mailed. This testimony, at best, provided circumstantial evidence of mailing. As has been held in this connection:

"Evidence of mailing can be either direct or circumstantial, but if circumstantial, the circumstances proved 'must directly support an inference of the fact and exclude all reasonable doubt concerning its existence.' *United States v. Berg*, 144 F.2d 173, 174-175 (C.A. 3, 1944); *Cohen v. United States*, 50 F.2d 819 (C.A. 3, 1931)." *United States v. Wolfson*, 322 F. Supp. 798, 812 (D.C. Del. 1971), affd. 454 F.2d 60 (3rd Cir. 1972), cert. den., 406 U.S. 924, 92 S.Ct. 1972.

Here the government's only testimony on the issue neither "directly support(s) an inference" of mailing nor "exclude(s) all reasonable doubt concerning its existence". Miss Putz only identified each letter as having been typed by her and signed by Sweeney, and explained that her usual office procedure was to mail all correspondence at the end of the business day.

However, she also explained that it was normal office procedure for her to take all typed documents into Sweeney's office where he would sign certain of the documents and not sign others; those signed would be returned to her for mailing (636a). She had no personal recollection of mailing any of the subject letters, and she was not able to say that any one of these letters was in fact mailed (637a-641a). She testified that she could not contradict Sweeney or any other witness who would state that the letters were hand delivered and not mailed (638a). Thus, the government's own evidence on normal office procedure was insufficient to prove that the subject letters were mailed. The only other government witness testifying in regard to the use of the mails was Leavy who merely "assumed" that the letter dated May 24, 1973 from Sweeney to Ohio Casualty Insurance Company (Government Exhibit 13-L, count three) was received by his company through the mail (408a). He stated that he had no personal knowledge whether or not it was mailed and that he could not contradict any witness who would testify that the letter was hand-delivered (407a-408a).

On the other hand, the prosecution presented testimony which was not only negated the inference that the mails were used, but affirmatively indicated that the letters were hand delivered. Indeed, testimony was elicited that it was normal to conduct business on a hand-delivery basis between Lurie's office and Ohio Casualty (340a).

"(Prosecution) And where are Mr. Lurie's offices?
(Leavy) In the Law & Finance Building.

(Prosecution) And was it normal to conduct business on a hand-delivery basis with Mr. Lurie's office?

(Leavy) Most of the time, he was in the building, particularly releases, and so forth were hand-delivered."

Thus, Petitioner could plainly have been convicted on conduct not even within federal jurisdiction, and thus not a

criminal act under federal law, a circumstance which if true, is obviously in contravention of his constitutional right to due process.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY W. GREENFIELD,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Petition For A Writ Of Certiorari has been served by United States Mail on:

Robert Bork,
Solicitor General of the United States
Department of Justice
Tenth and Constitution Avenues
Washington, D.C. 20530

Dated: July 7, 1976.

GREENFIELD & MINSKY,
STANLEY W. GREENFIELD,
Attorney for Petitioner.

**Judgment Order of the Court of Appeals for the
Third Circuit, Filed March 23, 1976**

**UNITED STATES COURT OF APPEALS
For The Third Circuit**

No. 75-1927 &
No. 75-1928

UNITED STATES OF AMERICA,

v.

LOUIS C. BOSCIA, CASEY BABUSCIO, THOMAS WARREN HENNING a/k/a Thomas Warren, ROY F. NORRIS, JR., THOMAS ROBERT GALLO a/k/a Thomas Roberts, DAVID TOMPKINS, JOHN V. SABATINI, JOSEPH L. BISCEGLIA, M.D., MICHAEL F. DeROSA, D.D.S., LEONARD E. SWEENEY, Esq.,

Thomas Warren Henning,
Appellant in No. 75-1927,

Leonard E. Sweeney,
Appellant in No. 75-1928.

(Crim. No. 75-3, W.D. of Pa.)

Argued March 22, 1976

BEFORE SEITZ, *Chief Judge*,
ROSENN and GARTH, *Circuit Judges.*

*Judgment Order of the Court of Appeals for the
Third Circuit, Filed March 23, 1976.*

JUDGMENT ORDER

After considering the contentions raised by appellant Henning, to-wit, that the district court erred (1) in determining that the Government produced sufficient evidence that the mails were used in connection with a scheme to defraud; (2) in denying his motion to dismiss on the basis that the indictment failed to allege all of the essential elements of an offense under 18 U.S.C. § 1341; and (3) in permitting cross-examination of Henning that he was a gambler; and after considering the contentions raised by appellant Sweeney, to-wit, that the district court erred (1) in determining that the evidence was sufficient to sustain the conviction on counts three, four and seven; (2) in denying his motion to dismiss on the basis that the indictment failed to allege all of the essential elements of an offense under 18 U.S.C. § 1341; (3) in refusing to instruct that the jury could either convict or acquit on the basis of accomplice testimony; (4) in refusing to instruct the jury as to the elements of the offense charged in accordance with his proposed point for charge and *United States v. Dreer*, 457 F.2d 31 (3d Cir. 1972); (5) in impermissibly broadening the indictment by erroneously instructing on portions of 18 U.S.C. § 1341 which were not included in the indictment; (6) in instructing that he could be bound by the acts of his alleged co-schemers and that it need only be shown the use of the mails was reasonably foreseeable; (7) in denying his motion for a mistrial and withdrawal of a juror on the ground that certain remarks by the Government during closing argument were improper and prejudicial; (8) in permitting a Government witness to testify concerning the effect of accident claims on insurance rates; (9) by improperly interfering with the presentation of his case through the judicial

*Judgment Order of the Court of Appeals for the
Third Circuit, Filed March 23, 1976.*

interrogation of certain witnesses; (10) by refusing to dismiss the indictment on the ground that selective prosecution of Sweeney violated his rights to due process and equal protection of the law; and (11) in denying his motions for severance; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

SEITZ,
Chief Judge.

Attest:

THOMAS F. QUINN,
Clerk.

Dated Mar. 23, 1976

**Order Dated June 8, 1976 Denying
Petition for Rehearing**

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 75-1927

UNITED STATES OF AMERICA,

vs.

LOUIS C. BOSCIA, CASEY BABUSCIO, THOMAS
WARREN HENNING a/k/a Thomas Warren, ROY F.
NORRIS, JR., THOMAS ROBERT GALLO a/k/a Thomas
Robert's, DAVID TOMPKINS, JOHN V. SABATINI,
JOSEPH L. BISCEGLIA, M.D., MICHAEL F. DeROSA,
D.D.S., LEONARD E. SWEENEY, Esq..

Thomas Warren Henning,

Appellant.

Present: SEITZ, *Chief Judge*,
ROSENN and GARTH, *Circuit Judges*.

Upon consideration of the petition by appellant for
rehearing before the original panel in the above-entitled case,

**Order Dated June 8, 1976 Denying Petition
for Rehearing.**

It is ORDERED that appellant's petition for rehearing
before the original panel be and hereby is denied.

By the Court,

COLLIN J. SEITZ
Chief Judge

DATED: June 8, 1976